(3)

Supreme Court, U.S.
FILED
MAY 21 2001
OFFICE OF THE CLERK

No. 00-1531

IN THE

Supreme Court of the United States

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

WILLIAM P. BARR
M. EDWARD WHELAN
1850 M Street, N.W.
Washington, D.C. 20036
(202) 463-5200

DAVID A. HILL
1 East Pratt Street
Baltimore, Maryland 21202
(410) 393-7725

MARK J. MATHIS
MICHAEL D. LOWE
1320 N. Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-7344

MARK L. EVANS*
MICHAEL K. KELLOGG
SEAN A. LEV
AARON M. PANNER
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

**Counsel of Record*

May 21, 2001

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 6

Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983) 6

GTE North, Inc. v. Strand, 209 F.3d 909 (6th Cir.), *cert. denied*, 121 S. Ct. 380 (2000) 1, 2, 3

International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963) 5

Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union, 457 U.S. 15 (1982) 5

Louisville & N.R.R. v. Rice, 247 U.S. 201 (1918) ... 7

Merrell Dow Pharm. Inc. v. Thompson, 478 U.S. 804 (1986) 3, 4

Mitchell v. Forsyth, 472 U.S. 511 (1985) 8

Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 8

Stark v. Wickard, 321 U.S. 288 (1944) 5, 7

Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd., 460 U.S. 533 (1983) 7

Young, Ex parte, 209 U.S. 123 (1908) 1

CONSTITUTION AND STATUTES

U.S. Const. Amend. XI 1, 3

Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*:

47 U.S.C. § 252(e)(6) 1, 7

Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* 4

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ..... *passim*

28 U.S.C. § 1331 ..... *passim*

IN THE

Supreme Court of the United States

No. 00-1531

VERIZON MARYLAND INC.,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

The Maryland Public Service Commission ("PSC") and its individual members state in their brief in opposition that they "do[] not oppose certiorari" on the questions relating to the scope of § 252(e)(6), waiver of Eleventh Amendment immunity, and application of *Ex parte Young*. Br. in Opp. 2. They insist, however, that the § 1331 issue does not warrant further review, arguing (1) that there is no "certworthy conflict" (*id.* at 10) between the decision below and the Sixth Circuit's decision in *GTE North, Inc. v. Strand*, 209 F.3d 909, *cert. denied*, 121 S. Ct. 380 (2000), and (2) that the Fourth Circuit's determination of the issue was correct.

The PSC is wrong on both counts.

1. According to the PSC, the Sixth Circuit's holding in *Strand* — that § 1331 provides subject matter jurisdiction to review a state commission order for alleged violation of federal law — applies only to orders "entered in an independent state law proceeding unrelated to an arbitration" under the 1996 Act. Br. in Opp. 10. *Strand* is therefore "clearly distinguishable from the Fourth Circuit's ruling" in this case, the PSC argues, because the administrative order at issue here was adopted under *federal* law, not state law. *Id.*[1]

There are at least three things wrong with the PSC's analysis. First, contrary to the PSC's view, the Sixth Circuit nowhere restricted its jurisdictional holding to state commission orders issued under state law. As the court itself stated, its holding rested on a broader jurisdictional principle — namely, that "federal review is available under § 1331 to determine whether state commission orders violate federal law except in cases in which the challenged regulatory action is clearly an interlocutory order arising out of § 252 proceedings." 209 F.3d at 919. Indeed, the Sixth Circuit specifically rejected the notion — embraced not only by the district court in *Strand*, but also by the Fourth Circuit and the PSC here — that "§ 252(e)(6) is the exclusive basis for judicial review of state commission actions that in any way relate to interconnection agreements." *Id.* As the Sixth Circuit explained, that restrictive theory would allow state commissions to "insulate regulatory requirements that violate the [1996 Act] from federal, and possibly even state, court review," and would thereby "conflict[] with Congress's decision . . . to concentrate judicial review of interconnection agreements in the federal courts." *Id.*

---

[1] As the PSC explains, its "order specifically involved the application of an FCC order interpreting the provisions of the 1996 Act." Br. in Opp. 10.

Second, the PSC's theory would impute to Congress an intention to adopt a most improbable jurisdictional scheme — one that opens the federal courts to review of state commission orders issued in the exercise of *state* law authority, while closing the federal courts to review of state commission orders issued in the exercise of *federal* law authority. That is not what the Sixth Circuit held, nor is it a sensible reading of the statutory text or congressional purpose.

Third, the Fourth Circuit's decision rests on the proposition that the PSC's order was adopted, in part, in the exercise of state law authority. *See* Pet. App. 42a. The PSC cannot explain why the state commission's determination in *Strand* — which, like the PSC's determination here, involved interpretations of federal law — was somehow more of an "independent state law proceeding" than the PSC proceeding at issue here, much less how this would support its claim that the order in *Strand* was subject to review in federal court, while the PSC's order here was not. Indeed, the PSC's insistence that *Strand* is distinguishable on this basis is particularly unconvincing because the Fourth Circuit itself acknowledged that its ruling was inconsistent with *Strand*. *See id.* at 50a.

2. The PSC fundamentally misconceives the merits of the § 1331 issue, conflating subject matter jurisdiction with unrelated notions of abrogation of Eleventh Amendment immunity, federal preemption, and private rights of action (*see* Br. in Opp. 11-17), while failing meaningfully to confront the key precedents summarized in the Petition.

At the core of the PSC's confusion is its misapprehension of *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986). At issue in that case were state court tort actions alleging that a child was born with multiple deformities as a result of the mother's ingestion of Bendectin during pregnancy. The question

was whether the actions were properly removed to federal court on the theory that a count in the complaints alleged that Bendectin was "misbranded" in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"). For purposes of resolving that issue, the parties accepted, and the Court assumed, that Congress "determin[ed] to preclude federal private remedies" for violation of the FDCA. *Id.* at 814. On the basis of that assumption, the Court held "simply . . . that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.*

Mistakenly believing that this case is akin to *Merrell Dow*, the PSC launches into a lengthy discussion of whether the 1996 Act creates a private cause of action to challenge a state commission's violation of federal law and whether the 1996 Act occupies the field of telecommunications regulation and therefore precludes all state regulation. *See* Br. in Opp. 13-17. Unlike the situation in *Merrell Dow*, however, the action in this case was not brought in state court to vindicate rights established under state law. Rather, the action was brought in federal court to vindicate federal rights and to secure review of administrative action implementing a federal statute. Contrary to the PSC's assumption, the 1996 Act nowhere forecloses an action challenging the decision of a state commission, issued in the exercise of federal law authority, for alleged violations of the federal statute. *See* Pet. 21 ("Nothing in the text or legislative history of the 1996 Act supports the proposition that, insofar as § 252(e)(6) does not apply, Congress 'intended for the right of review to be exercised in State courts.'") (quoting Pet. App. 49a). As this Court has held, "the silence of Congress as to judicial

review is . . . not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts." *Stark v. Wickard*, 321 U.S. 288, 309 (1944).

Here, as in *Jackson Transit Authority v. Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15 (1982), the question is not whether Congress intended to create an implied federal right of action to "vindicate contractual rights set forth by federal statutes," but rather "whether Congress intended such contract actions to set forth federal, rather than state, claims." *Id.* at 21, 22. Because "Congress intended that . . . [interconnection] agreements be 'creations of federal law,' and that the rights and duties contained in those contracts be federal in nature," the action here "states federal claims" and therefore properly invokes the federal district court's jurisdiction under § 1331. *Id.* at 23 (citation omitted). *See also International Ass'n of Machinists v. Central Airlines, Inc.*, 372 U.S. 682, 692 (1963).

The PSC's assessment of the standards "for evaluating whether a private cause of action may be inferred from a statute" (Br. in Opp. 13) is therefore beside the point. So too is its discussion of whether the 1996 Act "totally precludes State regulation" of interconnection agreements. *Id.* at 15. It obviously does not. But that has nothing to do with whether an action challenging the manner in which a state commission conducts such regulation raises fundamentally federal issues within the subject matter jurisdiction of a district court under § 1331. It obviously does.

At bottom, the PSC's defense of the Fourth Circuit's decision ignores the fact that the Fourth Circuit never questioned that Verizon sought to vindicate rights under federal, not state, law. Pet. App. 7a. This Court recently and unequivocally held that, in such circumstances, the federal courts have jurisdiction under

§ 1331 regardless of whether the cause of action is one created by state law or federal law. *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

The decision in *City of Chicago* is particularly instructive here. A property owner alleging (among other things) federal constitutional violations filed state court actions challenging, under a state administrative-review statute, a decision of the Chicago landmarks commission denying an application for permits to demolish designated landmarks. The city defendants removed the case to federal district court, and this Court ruled that removal was proper in these circumstances because the "state court complaints raised a number of issues of federal law in the form of various federal constitutional challenges." *Id.* at 164. It was of no consequence that "the federal constitutional claims were raised by way of a cause of action created by state law." *Id.* "As we have explained, . . . '[e]ven though state law creates [a party's] causes of action, its case might still "arise under" the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law.'" *Id.* (quoting *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983)) (brackets in original).

The circumstances in this case are significantly more compelling than those in *City of Chicago*. Unlike the municipal landmarks commission there, which exercised state law authority to resolve issues under a municipal ordinance, the PSC here was exercising federal law authority to resolve issues under a federal statute. If the state suits there arose under federal law for purposes of § 1331, surely the federal suit here, which raises issues fundamental to proper implementation of the 1996 Act, likewise arises under federal

law and falls clearly within the federal district court's jurisdiction under § 1331.

Significantly, the PSC does not respond at all to our reliance on this Court's federal tariff cases (*Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 534 (1983) (per curiam); *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918)) or on *Stark v. Wickard* and its progeny, even though both lines of authority also strongly support federal court jurisdiction in this case. *See* Pet. 21-24. The PSC's silence on these cases is testimony to the force of their analogy to the circumstances at issue here.

3. We believe, for the reasons stated in the Petition and in this Reply, that a federal district court has independent subject matter jurisdiction under § 1331 to determine whether a state commission's action interpreting or enforcing an interconnection agreement violates the 1996 Act. It is important to note, however, that the correctness of our position is less important at this stage than the undisputed fact that consideration of the § 1331 issue is necessary to ensure that the Court can resolve the full set of jurisdictional questions related to the § 252(e)(6) issue that this Court has already agreed to review in *Mathias*.

If the Court holds in *Mathias* that § 252(e)(6) does not provide subject matter jurisdiction, there is some doubt whether it could consider § 1331 as an alternative basis of jurisdiction there because the § 1331 issue is not presented in that case.[2] But, as we explained in the Petition (at 4, 14), and as the Solicitor General has confirmed in the government's separate Petition (which likewise presents the § 1331 issue),

---

[2] The Court specifically limited its grant of certiorari in that case to three restated questions, none of which involves § 1331. Moreover, the court of appeals in *Mathias* gave no consideration to § 1331 in reaching its decision.

"the telecommunications industry and federal and state regulators have a need for prompt and definitive resolution of the question whether federal courts may review state commission decisions enforcing interconnection agreements." No. 00-1711 Pet. 13-14. The PSC has not disputed the urgent need for a conclusive determination of the closely related jurisdictional and constitutional issues raised here. That would be reason enough to grant certiorari in this case even if there were no circuit split on § 1331.

Certiorari is particularly appropriate here, moreover, because, as the Solicitor General explains, "some question may exist as to the standing" of the petitioners in *Mathias*. No. 00-1711 Pet. 14. Because the Illinois Commerce Commission ("ICC") and its commissioners (the petitioners in *Mathias*) prevailed on the merits in the Seventh Circuit, "[a] decision by this Court in the ICC's favor on the Eleventh Amendment and jurisdictional issues would afford the ICC no greater relief with respect to that case." *Id.*[3] The Solicitor General accordingly suggests that, "if the Court has any substantial concern about the ICC's standing in *Mathias*, the Court may wish to grant plenary review in this case as well." *Id.*

---

[3] As the Solicitor General notes (at 14 n.3), the collateral-order doctrine permits a state agency to appeal immediately an interlocutory order denying its claim of Eleventh Amendment immunity. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The underlying rationale for that principle is that the immunity would otherwise be "'effectively lost if a case is erroneously permitted to go to trial.'" *Id.* at 144 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). That rationale does not appear to bear on the question of standing in a case like *Mathias*, however, where the case has already proceeded to the merits and has been decided in the state agency's favor.

CONCLUSION

The petition for a writ of certiorari should be granted, at least as to questions 2, 3, and 4, and the case should be set for oral argument in tandem with *Mathias v. WorldCom Techs., Inc.*, No. 00-878. Alternatively, the petition should, at a minimum, be held pending the decision in *Mathias* and then disposed of as appropriate in light of that decision.

Respectfully submitted,

WILLIAM P. BARR
M. EDWARD WHELAN
1850 M Street, N.W.
Washington, D.C. 20036
(202) 463-5200

DAVID A. HILL
1 East Pratt Street
Baltimore, Maryland 21202
(410) 393-7725

MARK J. MATHIS
MICHAEL D. LOWE
1320 N. Court House Road
8th Floor
Arlington, Virginia 22201
(703) 974-7344

MARK L. EVANS*
MICHAEL K. KELLOGG
SEAN A. LEV
AARON M. PANNER
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

**Counsel of Record*

May 21, 2001